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Trump EPA Aims To Shield Air Cost-Benefit Rule From Biden, Hill Attacks  
December 9, 2020

The Trump EPA is making several legal and political arguments in an effort to shield its newly finalized rule rewriting Clean Air Act cost-benefit review procedures from reversal by the incoming Biden administration or Capitol Hill, including that the rule is procedural and thus exempt from the Congressional Review Act (CRA).

In another defensive maneuver, EPA is declaring that the rule will take effect immediately upon being published in the Federal Register. That could make it tougher for the Biden EPA to quickly undo the rule, and it echoes a tactic the agency used in its decision not to strengthen particulate matter (PM) air standards, also completed this week.

EPA Administrator Andrew Wheeler is touting the regulation as an accomplishment that will provide a first-of-a-kind legally enforceable requirement to conduct specific cost-benefit analysis procedures and disclose related assumptions, including separate calculation of the rules' "co-benefits" beyond the pollution directly targeted by a regulation.

"It creates a cause of action so the public can hold us accountable to ensure that we are following the regulation," Wheeler said during a Dec. 9 event held by the conservative Heritage Foundation to publicly unveil the rule. "The cost-benefit analysis must be done . . . under the guidelines we put in the regulation."

The Dec. 9 rule is one of several high-profile deregulatory measures the agency has been racing to complete before the end of the Trump administration's single term.

Perhaps mindful of possible attempts by the next administration or Congress to attack the rule, EPA in the final measure includes language in an effort to shield it from potential repeal efforts under the CRA.

"This rule is exempt from the CRA because it is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties," the rule states.

The final rule also includes provisions justifying its immediate effective date for the rule, without which the package could be subject to immediate pullback by Biden officials given the typical lag times between when final rules are announced, published in the Federal Register, and legally take effect.

"As a rule of Agency procedure, this rule is exempt from the notice-and-comment and delayed effective date requirements set forth in the Administrative Procedure Act," the rule states.

Richard Revesz, director of the Institute for Policy Integrity at New York University, tells Inside EPA the agency's assertions with respect to the rule's effective date and CRA exemption are "unusual" given the notice-and-comment process for the regulation.

"That is unusual given the magnitude of this rule, given the impact of the rule," he says.

He also predicts the rule "is going to be looked at very carefully for the ways in which it can be undone," with that effort likely to be a Biden administration priority.

The move to deem the rule in effect immediately echoes the agency's strategy for the PM rule, with the Trump administration short on time to get various measures on the books.

Multiple press reports have indicated that EPA is operating under the goal of completing its work on final rules by Dec. 15, in order to make it more likely they get them published in the Register before Biden is inaugurated.

In this vein, Wheeler acknowledged that the agency's science "transparency" rule has not yet been issued but said he hoped that it would be "unveiled in a couple of weeks." He added that "we actually are narrowing it a little bit more" than what the agency has proposed to make sure it will not exclude "important science for regulations in the future."

#### Political Attacks

EPA is also retaining its argument that it has authority to issue the cost-benefit rule under section 301 of the Clean Air Act, which is general authority that the EPA administrator has to carry out official responsibilities.

The rule text says this includes "internal Agency procedures that increase the Agency's ability to provide consistency and transparency to the public in regard to the rulemaking process under" the air law, though environmentalists have claimed the section is too vague to justify the agency's cost-benefit regulation.

Any effort by the incoming Biden administration to reverse the measure could run into administrative and political considerations, and Wheeler during the Heritage event appeared to preview attacks by backers of the rule against future repeal efforts.

"I suppose a future administration could try to do away with this regulation . . . which I think would be rather ironic for anyone to step in and say we are going to do a regulatory process to take transparency away from the American public," he said.

The final rule is broadly similar to the proposal EPA issued earlier this year with three main elements: a requirement for a "benefit-cost analysis" for future rules, development of that analysis according to "best practices" from the engineering, physical and biological sciences; and the mandate for separate reporting of co-benefits, according to an EPA summary.

The final version, however, includes several changes, such as provisions requiring separate calculation of domestic and international air pollution benefits; embracing a "systematic review" to inform health effects included in cost-benefit reviews; and calling for future EPA guidance on retrospective analysis of past rules.

"We do call for a guidance to be issued by the agency in the future to take a look at how past regulations were developed, to help guide us for future regulations," Wheeler said.

But he said this provision is "not retroactive" and is not a means to scuttle past regulations. It also appears to fall short of some industry calls for the rule to require retrospective analysis of future rules.

The final cost-benefit measure also requires quantified health effects of pollution to be based on a "clear causal or likely causal" relationship between pollutant exposure and effect.

Further, EPA in the final rule also clarifies that "for human health endpoints, a systematic review process must be used to evaluate the hazard data for the purposes of determining which endpoints to include" in a cost-benefit review. The agency says the move embraces the Science Advisory Board's call for such a review of the scientific literature, for the purposes of determining what health effects to include in the cost-benefit analysis.

#### Co-Benefits Attacks

The Trump EPA prioritized the air cost-benefit measure, and Wheeler had pledged to issue similar cost-benefit rewrites for multiple environmental statutes, in the event of a second Trump administration term.

The policy has been a flashpoint for controversy over claims by industry and the Trump EPA that prior EPA rules -- including the Obama-era mercury and air toxics standards (MATS) -- improperly relied on co-benefits to make the rule's benefits exceed costs.

The final regulation echoes the proposal in that it does not explicitly require the agency to disregard co-benefits when setting its rules, and it also does not require that rules pass a cost-benefit test.

"The costs could outweigh the benefits . . . all we are doing is requiring an accounting of both the costs and benefits to be made public," Wheeler said.

But Wheeler also reiterated the longstanding industry critique of co-benefits during the Heritage event, calling MATS the "poster child" for such strategies.

His remarks touting the enforceability of the cost-benefit rule also appear to confirm critics' concerns that the real goal of the measure is to provide a roadmap for industries to file suit over the adequacy of EPA's cost-benefit reviews.

"This is a way of throwing sand in the gears" for future regulations, former EPA Director of Economic Analysis Roy Gamse, a member of the EPA alumni group Environmental Protection Network, tells Inside EPA. For industry that means, "I can come and sue EPA because it did not do a cost-benefit analysis to my satisfaction."

But Wheeler argues that the rule at least in theory creates a cause of action for environmental groups and not just industry.

"If a trade association or, say, the [Natural Resources Defense Council], is not satisfied with the cost-benefit analysis in a future rulemaking, they will be able to take that to court and that will be an actionable item," he said.

Revesz argues that the rule is an example of regulatory "asymmetry" under which the Trump EPA has been "prioritizing costs and belittling benefits," with the rule making it easier for indirect benefits of rules to be ignored. "It is like separate but equal. Separate but equal is not equal," he says. -- Doug Obey ([dobey@iwpnews.com](mailto:dobey@iwpnews.com))

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